

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Certificates of  
Authority of American Family Mutual  
Insurance Company, American Standard  
Insurance Company of Wisconsin,  
American Family Life Insurance  
Company, Wisconsin Corporations, doing  
business in the State of Minnesota.

**PROTECTIVE ORDER**

A motion for a Protective Order was filed by the Department of Commerce on September 18, 1996. A Memorandum in Opposition to the Motion was filed on September 24, 1996, by the Respondents. The Department filed a reply on October 1, 1996.

The Department of Commerce was represented by Michael A. Sindt, Assistant Attorney General, and Joan C. Peterson, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130. The Respondents, American Family Insurance Companies, were represented by Cory J. Ayling, Esq., and Kathleen M. Brennen, Esq., of the firm of McGrann, Shea, Fransen, Carnival, Straughn & Lamb, 2200 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota 55402-2041.

Based upon the filings by the parties, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED THAT:

1. The Attorney General may contact and interview the Respondent's exclusive general agents in connection with this contested case proceeding.

2. The Attorney General shall advise any exclusive general agent contacted for information that:

A. The Attorney General represents the Department of Commerce in a proceeding against the American Family Insurance Companies and is gathering information for that case.

B. The agent contacted may seek legal advice before talking to the Attorney General if the agent desires to do so.

3. The Respondent, American Family Insurance Companies, including any of its employees, or persons acting on its behalf, shall not in any way coerce, intimidate or otherwise discourage any person, including its exclusive general agents, from cooperating and/or providing information or testimony to the Attorney General, the

Commissioner of Commerce or the Administrative Law Judge in connection with this contested case proceeding.

4. That any violation of this order may result in sanctions pursuant to Minn. Rule pt. 1400.6700, subp. 3, Minn. Rule Civ. Proc. 26.03 or other applicable statutes or rules

Dated this 3rd day of October, 1996.

---

GEORGE A. BECK  
Administrative Law Judge

### MEMORANDUM

The Department of Commerce filed a Motion for a Protective order in this matter asking for an Order prohibiting Respondents or anyone acting on their behalf from discouraging any person from cooperating with information gathering by the Department relative to this contested case proceeding. The allegations in this case are that Respondent terminated two of its exclusive general agents due to their activities at the legislature in support of an "anti-quota" bill, and that this action is contrary to Minnesota law.

Under Minn. Rule pt. 1400.6600, in ruling on motions where the Office of Administrative Hearings rules are silent, the Judge must apply the rules of Civil Procedure for the District Court for Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding. Minn. Rule Civ. Proc. 26.03 provides that the Court may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense during the discovery process. The rule may be utilized not only by those parties from whom discovery is sought but also by the party seeking discovery. Central Hide & Rendering Co. v. B-M-K Corp., 19 F.R.D. 296 (D. Del. 1956). The scope of a protective order may be as broad as is necessary to address the situation presented. Herr and Haydock, Minnesota Practice § 26.30. The party seeking an order must show good cause for its issuance.

The Department asserts that this order is necessary based upon an affidavit of an investigator with the Office of the Attorney General who states that she spoke by telephone with two of Respondents' exclusive independent insurance agents who were afraid to cooperate with the Department because they feared retaliation by American Family Insurance Companies. The agents indicated that there was a commonly held belief among agents that American Family Companies would retaliate against any agent who cooperated in the Department's investigation. The Department also points to the Respondent's termination of the contract of an agent who was soliciting proxies hostile to American Family management as support for the issuance of an Order. Ex. 1.

In its Memorandum in Opposition to the Motion, the Respondents argue that the Attorney General should not be allowed to contact its exclusive general agents because it is prohibited by Minn. Rule Prof. Conduct 4.02. That rule forbids a lawyer from communicating with "a party the lawyer knows to be represented" by another lawyer about the subject of the representation. The purpose of the rule is to protect represented parties from dealing with opposing counsel. The Respondents acknowledge that the insurance agents in question are not named parties to this proceeding. They suggest, however, that in the case of a corporate respondent, the definition of "party" extends to its employees and agents. Generally, the definition of a corporate party does include managerial or "control" employees whose admissions might bind the corporation. Wright v. Group Health Insurance Hospital, 691 P.2d 564 (Wash. 1984). The exclusive general agents are not employees, however, but independent contractors. (Ex. 2) Nonetheless, the Respondents contend that they should be included within the definition of party since their statements may constitute an admission on the part of the corporation.

At this point, there is nothing in the record to indicate that the statements of American Family independent contractor general agents would constitute an admission on the behalf of the Respondents, in the context of this contested case proceeding. In fact, as to the issues in this proceeding, the interests of some agents may be adverse to the Respondents. The Respondents have not shown nor does it appear likely that the agents have authority to bind the corporation within the meaning of the "control group" test. The Respondents request that there be a determination at this point that any admissions by agents would not bind the Respondents, is premature.

The Respondents acknowledge that in the case of In Re Prudential Insurance Company, 911 F. Supp. 148 (D. N.J. 1995) the court held that Prudential's current insurance brokers could be contacted ex parte by opposing counsel. The court extended party status only to the "control group" within Prudential's management. The control group included only employees with responsibility in making final decisions in the Prudential litigation or with responsibility for establishing policies on firm-wide procedures for sales of insurance products. This definition would not include the exclusive general agents in this case. The Respondents have not advanced a convincing rationale for extending the definition of party beyond its employees to its independent contractors. The Respondents' Memorandum evidences a general concern that the agents will release damaging information or potentially confidential information. These concerns do not seem to be different from the concerns the Respondents might have about any potential witness with information concerning this matter. The Respondents argue that the Attorney General should proceed by deposition to gather its information from general agents. However, at this stage of the proceeding, the Department is merely gathering information and would normally be permitted to contact any person it believed might have relevant evidence. Rule Prof. Conduct 4.2 does not appear to prohibit contact by the Attorney General with Respondents' exclusive general agents.

Secondly, the Respondents argue that if a Protective Order is issued, it should be crafted to protect all of the persons or parties involved, namely the State, the Respondents, and the exclusive general agents. They express concern that the State's

interview procedures may induce the manufacturing of evidence or may be intimidating. They seek requirements in the Protective Order to guard against this possibility. In regard to the interests of the general agents, the Respondents suggest that the agents should be aware that the Attorney General is not a neutral in this case and has interests that potentially conflict with those of the agents or that of their principal, namely American Family Insurance Companies. The Respondents assert that the Attorney General is bound by Rule 4.3 of the Rules of Professional Conduct which requires a lawyer dealing with an unrepresented person to clearly disclose whether the lawyer's client's interests are adverse to the interests of the unrepresented person.

Although there is no reason to believe that the interview procedure by the Attorney General would be intimidating, the Respondents do make a convincing argument that it would be appropriate under the Rules of Professional Conduct for the Attorney General to advise an unrepresented non-party exclusive general agent that he is representing the Department of Commerce in a proceeding against American Family Insurance Companies and is gathering information in regard to that case. Given the relative positions and interests of the Attorney General, the Department, the agents and the Respondents, it is also appropriate that an agent contacted be advised that he may seek legal advice before talking to the Attorney General. This will ensure that the agents contacted do not feel that they are obligated to provide information to the Attorney General without consulting an attorney, if they wish to do so.

Finally, the Respondents argue that the issuance of the Protective Order may create a danger of intimidating its agents to give questionable testimony against American Family. The Respondents seem most concerned that the Order not appear to be a rebuke to American Family, or that it be seen as an announcement that American Family retaliates against its agents. The language of this Order is intended to be as neutral as possible in that regard. This Order is issued not because the Respondents have retaliated or attempted to intimidate general agents in connection with this contested case proceeding. It is issued merely because the record indicates that there is a perception by two general agents that retaliation is a possibility. Obviously, the Respondents are not able to control perceptions on the part of its agents; however, neither should those perceptions interfere with the information gathering activities for this proceeding. The Respondents have not provided adequate reasons for some of the more extraordinary remedies it seeks such as advanced written notice of the agents the Attorney General wishes to contact, having representatives of American Family present at any interview, or an advance order that any statement from an agent shall not be admissible in evidence. Nothing in the record indicates that these measures are required in order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense during the discovery process.

The Commissioner of Commerce is charged by statute with the duty to investigate unfair or deceptive acts or practices in the insurance industry. Minn. Stat. § 72A.21. As the Department asserts, this contested case hearing procedure cannot be effective without the cooperation of persons who have information concerning the allegations made in this proceeding. It is in the public interest that potential witnesses feel free to provide information without fear of adverse consequences. Both the affidavit

of the investigator as well as the nature of the allegations in this matter demonstrate good cause for issuance of this Protective Order.